



By T. Watson

Wherein lies the power?

Reliance upon powers of attorney

A power of attorney is a document by which one person (called the ‘donor’) grants another person (called the ‘attorney’ or ‘donee’) the power to act on his behalf and in his name. The attorney created in a power of attorney is an attorney-in-fact, which is different from an attorney-at-law or lawyer.

Powers of attorneys are generally used to facilitate the carrying out of the donor’s business affairs and may be granted by an individual or by a company, provided that the latter is permitted so to do by its Articles of Association/Incorporation. A common situation in which a power of attorney is granted by an individual is one where the donor is travelling abroad or otherwise unavailable and wishes the attorney to conduct certain business during the donor’s absence abroad. Similarly, the donor may reside abroad and may wish to grant a power of attorney in respect of certain acts to be done in Jamaica.

Where a power of attorney is executed abroad for use by an attorney for acts in Jamaica, the following are a few of the considerations that ought to be borne in mind:

- the document must comply with the formalities in Jamaica required to give effect to powers of attorney here. For example, it is noted that:
 - (1) depending on the nature of the act to be performed, a simple letter may suffice to authorise the attorney to act. However, other acts may require the extra formality that the document be executed as a deed;
 - (2) the requirement that the document be stamped under the Stamp Duty Act is pertinent as an unstamped or insufficiently stamped instrument may not be admitted in evidence in Court;
 - (3) depending on the nature of the act to be performed, there may be certain procedural requirements to be followed; for example that the power of attorney or a copy be deposited with the Registrar of Titles for dealings with registered land under the Registration of Titles or, in other instances,

be recorded at the Record Office in accordance with the provisions of the Conveyancing Act.

- Powers of attorney may be as extensive or as limited as desired by the donor. Whether it is being utilized for a one-off transaction or for a series of various transactions over time, it should be noted that the powers granted in the document are construed strictly in accordance with its express terms. For example, it has been held that a power to “make sale, dispose of, assign and transfer” did not confer upon the attorney the right to pledge property. It is therefore important that when drafting a power of attorney the particular powers being granted are expressly stated in the document. Further, the urge to use a general “catch all” clause as a means to cover any power that the donor may have omitted to mention should be resisted as such clauses are viewed as granting only such powers as are incidental to the specific power(s) granted in the document.
- The donor must have the relevant capacity under law to grant a power of attorney. Generally, this means that the donor is an adult of sound mind. The donor’s mental capacity must be present both at the time when the power was granted and at the time when the attorney acts. There are some jurisdictions which, by statute, provide for a form of power of attorney that will continue to have full effect even after the donor has lost mental competence. However, Jamaica does not similarly provide for the creation of this “durable” power of attorney and so this form of power of attorney may not be relied upon in Jamaica.
- Generally, a power of attorney is revoked by express revocation – which may be by passage of time if a date is specified or upon completion of the particular task – or may be revoked automatically by operation of law; for example upon the death or unsoundness of mind of the donor. This said, it is noted that there are certain statutory exceptions to the operation of revocation by operation of law; for example under Section 23 of the Trustee Act which protects the trustee acting or paying money in good faith in certain circumstances where the donor was dead at the time of payment or the performance of the relevant act that the donor must have mental capacity.

There are specific rules which govern the drafting, interpretation and effectiveness of a power of attorney. These are of particular importance when relying in Jamaica upon a document that has been executed outside Jamaica and so great care must be taken to ensure that the provisions of the instrument have the intended effect.